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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

SAN FRANCISCO POLICE OFFICERS' ASSOCIATION, LYNNE A. TORRES, LILLIAN CHAI MATTOCH, and HENRY KIRK,
Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

1. This Case Presents The Fundamentally Important Question of Whether Non-Minority Victims of Employment Discrimination May Be Denied Make Whole Relief Where Their Public Employer Abandoned Consent Decree Examinations to Avoid Adverse Impact on Minorities And Women 1
2. The City, as a Discriminator, had the Burden of Showing that Individual Discriminatees Were Denied Promotions for Lawful Reasons; Having Found Discriminatory Action, the Ninth Circuit Should Have Remanded to the District Court to Determine all Remaining Issues 4
3. Any Procedural Issues May Be Resolved on Remand by The District Court 5

Conclusion 8

TABLE OF AUTHORITIES

Cases

Allen v. McKinley, 18 Cal.2d 697 (1941) 3

Andugar v. Rogowski, 113 FRD 151, (1986, S.D.N.Y.) ... 7

Bushey v. New York State Civil Service Commission, 469 U.S. 1117, 83 L.Ed.2d 795, 105 S.Ct. 803 (1985) 3

Cooperrider v. Civil Service Commission of San Francisco 97 Cal.App.3d 495 (1979) 3

Doe v. Harris, 696 F.2d 109 (D.C. Cir., 1982) 7

Firefighters Institute v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980) 5

Jones v. St. Paul Fire and Marine Insurance Company, 108 F.2d 123 (5th Cir., 1939) 7

Lucchessi v. City of San Jose, 104 Cal.App.3d 323 (1980) 3

Rhodehamel v. Civil Service Board, 18 Cal.2d 709 (1941) 3

Skelly v. State Personnel Board, 15 Cal.3d 195 (1975) ... 3

Soler v. G and U, Inc., 103 FRD 69 (1984, S.D.N.Y.) ... 6, 7

Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396 (1977) 4

Ward's Cove Packing Company, Inc. v. Frank Antonio, 487 U.S. ____, 101 L.Ed.2d 827, 109 S.Ct. 2115 (1989) 2

Watson v. Fort Worth Bank and Trust, 487 U.S. at ____, 108 S.Ct. at 2787 3

Wilmington Firefighters v. City of Wilmington, 632 F.Supp. 1177 (Del. 1986) 3

Wygant v. Jackson Board of Education, 476 U.S. 267, 90 L.Ed.2d 260, 106 S.Ct. 1842 (1986) 3

Statute

42 U.S.C. § 2000e-5(g) 5

Rules

FRCP, Rule 15(a)-(c) 6

FRCP, Rule 54c 7

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1. THIS CASE PRESENTS THE FUNDAMENTALLY IMPORTANT QUESTION OF WHETHER NON-MINORITY VICTIMS OF EMPLOYMENT DISCRIMINATION MAY BE DENIED MAKE WHOLE RELIEF WHERE THEIR PUBLIC EMPLOYER ABANDONED CONSENT DECREE EXAMINATIONS TO AVOID ADVERSE IMPACT ON MINORITIES AND WOMEN

The third (and final) Ninth Circuit decision (Appendix A) first clearly holds that the City violated the "no discrimination" provisions of the Consent Decree by changing examination scores on the basis of race and sex to favor minorities and women with no justification but then avoids the tough question of delineating minority and non-minority rights to promotional positions in the

Police Department. The Ninth Circuit erroneously identified the victims of discrimination as

> . . . . (N)ot the particular officers who had done well under the first weighting, as they had acquired no rights, but the larger group of all white males who took the test and who were passed over by the discriminatory weighting and subsequent promotions. (Appendix A-3)

The Court was wrong.

It was *not* the larger group of white males passed over by the discriminatory weighting who were victims, but the group of 51 white and minority males and females who were forever barred from the ranks of Sergeant and Inspector when the City, on April 6, 1986 (28 days after the filing of Appellants' Opening Brief in the Court of Appeal) made the fateful mistake of using the tainted promotional lists. The City knowingly assumed the risk of promoting the wrong people while the case was *sub judice* and must now pay the price to the right people.

The Ninth Circuit concluded (and the City and OFJ argue) that Petitioners ". . . . . acquired no rights . . ." under the original scoring scheme and that ". . . . (T)he test itself was not in compliance with the Consent Decree. . . .", because the initial results had an adverse impact on women and minorities. (Appendix A-2)

The Court (and the City and OFJ) are wrong again. The City was not justified in abandoning the use or defense of the examination upon a mere statistical showing of racially disparate results; Petitioners acquired rights in the presumptively valid examination procedures and should be granted some remedy.

This Court, in *Ward's Cove Packing Company, Inc. v. Frank Antonio* 487 U.S. ____, 101 L.Ed.2d 827, 109 S.Ct. 2115, 2125 (1989) held that mere underrepresentation of minorities alone will *not* suffice to make out a prima facie case of disparate impact:

> To hold otherwise would result in employers being potentially liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work

> forces". *Watson v. Fort Worth Bank and Trust, supra*, 487 U.S. at ____, 108 S.Ct. at 2787.

In accord, *Wygant v. Jackson Board of Education* 476 U.S. 267, 90 L.Ed.2d 260, 106 S.Ct. 1842 (1986); *Wilmington Firefighters v. City of Wilmington*, 632 F.Supp. 1177 (Del. 1986); *Bushey v. New York State Civil Service Commission*, 469 U.S. 1117, 83 L.Ed.2d 795, 105 S.Ct. 803 (1985), dissent of Chief Justice Rehnquist, Mr. Justice Berger and Mr. Justice White.

The City here tried a politically expedient short cut by concluding that a mere showing of statistical disparity justified race-conscious employment decisions—changing examination scores to benefit minorities and women, thereby discriminating against the 51 candidates displaced by the reweighting. *Wards Cove* forbids such a tactic.

Indeed, the Consent Decree provides that tests with disproportionately adverse impact may be used if they are otherwise valid under the *Uniform Guidelines on Employee Selection Procedures*. (Appendix H-18) Further, in California, rights (whether anticipated or presently held) in public employment are considered substantial, vested, and fundamental: *Lucchessi v. City of San Jose*, 104 Cal.App.3d 323 (1980) and *Cooperrider v. Civil Service Commission of San Francisco* 97 Cal.App.3d 495 (1979); see, generally, *Skelly v. State Personnel Board* 15 Cal.3d 195 (1975). In *Lucchessi* and *Cooperrider*, the Courts so held in regards to persons seeking *initial* employment, persons not yet even employed. California's Supreme Court has consistently emphasized that the rights of incumbent city employees to promotions under merit or civil service systems are entitled to zealous judicial enforcement (*Rhodehamel v. Civil Service Board*, 18 Cal.2d 709 (1941) and *Allen v. McKinley*, 18 Cal.2d 697 (1941). Indeed, California courts consistently hold that the civil service rules and regulations of a public agency constitute a part of the employees' implied contract of employment with the public agency. *Frates v. Burnett* 9 Cal.App.3d 63 (1970). While it may be true that a civil service system cannot create property rights on eligibility lists which are clearly the fruit of examinations unlawful under Title VII, this legal conclusion begs the question here presented, namely what property rights are acquired from eligibility lists

derived from examinations which, from all appearances, were content valid.

The City's position is that Petitioners herein had no right to promotions from "flawed" eligible lists, i.e., lists which showed adverse impact on minorities and women. But the City was required, under the Consent Decree, to substantiate the validity of the examinations rather than engage in any form of race-conscious manipulation of examination components.

This Court should grant review to determine and balance the reasonable and longstanding expectations of all candidates to fair, valid examinations based on merit, fitness and job relatedness against the City's ability to engage in voluntary "affirmative action".

2. THE CITY, AS A DISCRIMINATOR, HAD THE BURDEN OF SHOWING THAT INDIVIDUAL DISCRIMINATEES WERE DENIED PROMOTIONS FOR LAWFUL REASONS; HAVING FOUND DISCRIMINATORY ACTION, THE NINTH CIRCUIT SHOULD HAVE REMANDED TO THE DISTRICT COURT TO DETERMINE ALL REMAINING ISSUES

The City created victims of discrimination by promoting the wrong candidates from (at the time of the promotions) disputed eligible lists. Having gambled and lost on the question of liability, the City now has the burden, in the District Court, to show that the displaced candidates are *not* entitled to a remedy.

This Court in *Teamsters v. United States* 431 U.S. 324, 361-362, 52 L.Ed.2d 396, 431-432 (1977) confirmed the employer's burden to show remedial non-entitlement:

> . . . . . The question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. . . . The burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

The Eighth Circuit in *Firefighters Institute v. City of St. Louis*, 616 F.2d 350, 362-363 (8th Cir. 1980) required retroactive appointments of qualified (black) candidate discriminatees:

> . . . . . We do not feel that the demotion of the twenty-three whites and one black is an appropriate alternative.
>
> The only other available alternative is to require that a number of blacks be promoted to the position of fire captain and that their effective promotion date be the same as that of the twenty-four previously appointed captains. (Citations omitted.)

The twenty-four "beneficiaries" in St. Louis had been promoted from invalid lists.

Having promoted the "wrong candidates", the City must grant appropriate relief to the 51 displaced candidates: retroactive promotion, back pay, and seniority. 42 U.S.C. § 2000e-5(g). The Ninth Circuit, after determining that Petitioners were victims of discrimination, erred in failing to remand to the District Court to resolve remedial issues.

3. ANY PROCEDURAL ISSUES MAY BE RESOLVED ON REMAND BY THE DISTRICT COURT

The City and Intervenors (Officers' for Justice), in opposition to the Petition, argue that many of the actual 51 victims of "reverse discrimination" have not filed their own action, are not and cannot be represented by the Police Officers' Association, and are presently unidentified.

The original Complaint, filed by the SFPOA and three named candidates in state court, sought to stop the implementation of an illegal, discriminatory employment decision. The City created victims by subsequently promoting 120 candidates, including 51 candidates who would not have been promoted at all from the original weights, completely displacing 51 other candidates. Promotions were made in April of 1986, two (2) years after the filing of the original Complaint and eight (8) weeks after the filing of Petitioners' Opening Brief in the Ninth Circuit. Liability was not finally established until March 7, 1989, almost five (5) years after the Complaint was filed in state court.

All parties, at trial and on appeal, vigorously litigated the rights of the non-minority victims of discrimination. The district court had granted a preliminary injunction against the use of the reweighted tests to determine non-minorities' rights (Appendix F2), and the Court's final decision focused on whether non-minority rights were unnecessarily trammeled (Appendix F-9 to F-16). These same issues, including the prayer for a remedy to the non-minority victims of discrimination, were addressed in all appellate briefs and petitions for rehearing. Neither the City nor OFJ can or should now be heard to say that these issues have not been addressed by all parties. Any technical issues of pleading can, of course, be corrected upon remand.

First, the District Court has consistently recognized the POA as a full participating party in all Consent Decree matters:

> It is also very significant that this Decree was negotiated by representatives of the San Francisco Police Officers' Association (POA), of which the objecting sergeants are members. Its elected Board of Directors recommended the approval of the agreement and its membership approved the agreement by a 76% majority. The POA is a certified collective bargaining agent for the police officers of San Francisco, and it recently negotiated with the Police Department a Memorandum of Understanding that has the force of a collective bargaining contract in California. . . . . In summary, in strenuously opposing and helping to defeat a proposed settlement last spring because of its adverse impact on its members' interests and in consistently asserting the promotional interests of its members in proceedings before this court, the POA has convincingly demonstrated its commitment to its sergeants. The fact that the POA accepted this proposed Consent Decree is a persuasive argument that the Decree represents a fair and reasonable end to this litigation for these sergeants and other incumbent police officers. (Appendix, H-8 to H-9)

Second, the initial complaint filed by Petitioners is subject to a motion to amend under FRCP Rule 15(a)-(c), including the filing of a supplemental pleading. See *Soler v. G and U, Inc.* 103

FRD 69, (1984, S.D.N.Y.); *Andugar v. Rogowski*, 113 FRD 151, 155 (1986, S.D.N.Y.).

Third, FRCP Rule 21 provides broad discretion in the District Court to allow additional plaintiffs, even though the statute of limitations may have run. *Andugar v. Rogowski, supra*, 113 FRD 151, 154.

Fourth, Intervenor OFJ has represented, quite successfully, the rights of unnamed women and minority police officers over the years under the Consent Decree, and no one would suggest OFJ's lack of standing to do so. Why should the POA, merely because it represents non-minorities and men as well as women and minorities, be denied the same standing to assert the rights of its 1700-plus members? All such issues may be submitted to the District Court, after remand, by amendment of pleadings. *Jones v. St. Paul Fire and Marine Insurance Company* 108 F.2d 123, (5th Cir., 1939).

Finally, as to the conclusion by the Ninth Circuit, and the argument now advanced by the City and OFJ that Petitioners did not seek the remedies claimed now but not specifically prayed for in the initial complaint, it is undisputed that Petitioners did pray "for such other and further relief as this Court deems just and proper." Such language is construed as implying a request for damages under FRCP, Rule 54c; see *Doe v. Harris* 696 F.2d 109, 114, fn. 8 (D.C. Cir., 1982).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted, the decision of the Court of Appeals for the Ninth Circuit should be modified, and the case remanded to the District Court for determination of an appropriate remedy for Petitioners.

Dated: September 5, 1989.

Respectfully submitted,

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